

E-Filed 10/8/15

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SALVATORE MARINO,  
Plaintiff,

v.

U.S. BANK, N.A.,  
Defendant.

Case No. 15-cv-02935-HRL

**ORDER JUDICIALLY NOTICING  
PUBLIC RECORDS**

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT'S  
MOTION TO DISMISS**

Re: Dkt. Nos. 9, 10

Salvatore Marino ("Marino") sues U.S. Bank, N.A. ("USBA") with two claims: (1) USBA committed "dual tracking" in violation of California's Homeowner Bill of Rights ("HBOR") by proceeding with a foreclosure process while simultaneously renegotiating the terms of Marino's mortgage, Cal. Civ. Code § 2923.6; and (2) USBA's dual-tracking business practices violate California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200 et seq. Dkt. No. 1-1 at 36-39. Marino alleges that he applied to USBA for a loan modification, that he timely submitted supplemental documents for several months whenever requested by USBA, and that USBA recorded a notice of trustee's sale without first granting or denying his pending loan modification application.

Marino sued USBA in California's Superior Court for an injunction against the sale. The Superior Court granted a temporary restraining order against USBA and also ordered USBA to show cause why a preliminary injunction should not be issued. USBA removed the case to this court, moved to dismiss under Federal Rule of Civil Procedure ("FRCP") 12(b)(6) for failure to state a claim, and requested judicial notice of relevant public records. Dkt. Nos. 1, 9, 10.

1 The parties have expressly consented to magistrate jurisdiction. The court has considered  
2 the arguments in the parties' briefs and the arguments heard on September 8, 2015. The court  
3 judicially notices the public records. USBA's motion to dismiss is denied in part and granted in  
4 part.

#### 5 **Judicial Notice**

6 Federal Rule of Evidence 201(b) generally permits a court to judicially notice county  
7 records as facts that can be accurately and readily determined from sources whose accuracy cannot  
8 reasonably be questioned. *See, e.g., Rosal v. First Federal Bank of California*, 671 F.Supp.2d  
9 1111, 1121 (N.D. Cal. 2009). USBA requests judicial notice of four documents from the Santa  
10 Clara County Recorder's office that relate to Marino's property: (1) the deed of trust, document  
11 number 19402100; (2) the assignment of the deed of trust, document number 21347471; (3) the  
12 notice of default and election to sell under deed of trust, document number 22598786; and (4) the  
13 notice of trustee's sale, document number 22880821. The court grants the request for judicial  
14 notice of these county records.

#### 15 **Motion to Dismiss**

16 A motion to dismiss under FRCP 12(b)(6) tests the legal sufficiency of the claims in the  
17 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate where  
18 there is no cognizable legal theory or there are insufficient facts alleged to support a cognizable  
19 legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).  
20 The court assumes the truth of factual allegations and construes them in the light most favorable to  
21 the claimant. *Id.* But the court may disregard conclusions not supported by underlying factual  
22 allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The court then draws upon its  
23 "experience and common sense" to answer a "context-specific" question: do the alleged facts  
24 support a plausible claim on which relief might be granted? *Id.* at 679.

25 HBOR prohibits a lender from recording a notice of sale while a complete loan  
26 modification application is pending, Cal. Civ. Code § 2923.6, but HBOR provides this protection  
27 only with respect to "first lien mortgages or deeds of trust that are secured by owner-occupied  
28 residential real property[.]" Cal. Civ. Code § 2924.15(a). A plaintiff may sue under HBOR to

1 enjoin an impending sale that was noticed while a complete loan application was pending, but a  
2 plaintiff is not entitled to economic damages until the home has been sold. Cal. Civ. Code §  
3 2924.12.

4 The UCL applies when the claimant is harmed by business practices that are also illegal  
5 acts. *See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163,  
6 180 (1999).

7 USBA argues Marino’s dual-tracking claim fails “as a matter of law” for three independent  
8 reasons: Marino failed to plausibly allege he is an owner-occupant of the property that secures the  
9 deed of trust, he failed to plausibly allege the submission of a complete loan modification  
10 application, and he asks for damages that cannot be awarded if the home has not been sold.  
11 USBA also argues Marino lacks standing under the UCL and that, as well, the UCL claim is not  
12 adequately “tether[ed]” to plausible allegations of predicate illegal or deceptive conduct. Dkt. No.  
13 9 at 8-9.

14 A court may consider judicially noticed “matters of public record” in its analysis of a  
15 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The first page  
16 of the deed of trust lists Marino’s address as 1679 Dry Creek Road, San Jose CA, 95125. Dkt. No.  
17 10-1 at 2. The third page lists the address of the property that secures the loan—also 1679 Dry  
18 Creek Road in San Jose. *Id.* at 4. And Marino’s complaint alleges he resides in San Jose,  
19 California. Dkt. No. 1-1 at 34. Marino’s alleged residence in San Jose and the deed of trust,  
20 together, plausibly show Marino is an owner-occupant entitled to protection against dual tracking  
21 under HBOR.

22 USBA relies on *Woodring v. Ocwen Loan Servicing, LLC*, No. CV 14-03416 BRO, 2014  
23 WL 3558716 (C.D. Cal., July 18, 2014), to argue Marino has not alleged sufficiently “robust  
24 factual allegations” to plausibly show he ever submitted a completed application. Dkt. No. 9 at 7.  
25 But *Woodring* cited the allegations in *Flores v. Nationstar Mortg. LLC*, No. CV 13-3898 PLA,  
26 2014 WL 304766 (C.D. Cal., Jan. 6, 2014), as an example of sufficiently “robust” allegations: the  
27 homeowner submitted a loan modification application; the loan servicer requested additional  
28 documents over the course of two months; the homeowner timely submitted every document

1 requested; and then the lender instituted a foreclosure sale without either granting or denying the  
2 homeowner's pending modification application. *Flores*, 2014 WL 304766 at \*3-4. Marino has  
3 alleged facts substantially similar to the allegations in *Flores*: he applied for a loan modification;  
4 he timely submitted each supplemental document requested by USBA from July 2014 to May  
5 2015; and USBA nevertheless recorded a notice of trustee's sale without either granting or  
6 denying his pending application. Dkt. No. 1-1 at 36-37. The court finds Marino has plausibly  
7 alleged the submission of a complete loan modification application and that he has therefore  
8 plausibly alleged a dual tracking claim upon which relief might be granted.

9 USBA is correct, though, that HBOR entitles a homeowner to an injunction, rather than the  
10 general and special damages requested in the complaint, when the home has not yet been sold.  
11 The court dismisses the HBOR claim for relief because it improperly requests general and special  
12 damages. Plaintiff may have 10 days leave to amend to request injunctive relief.

13 Marino's UCL claim is plausible because an illegal business practice, dual tracking, has  
14 been plausibly alleged as a sufficient predicate.

15 A plaintiff has standing to bring a UCL claim when he "has suffered injury in fact and has  
16 lost money or property." Cal. Bus. & Prof. Code § 17204. A plaintiff has suffered sufficient  
17 economic injury when the alleged UCL violation caused the plaintiff to "enter into a transaction,  
18 costing money or property, that would otherwise have been unnecessary." *Kwikset Corp. v.*  
19 *Superior Court*, 51 Cal. 4th 310, 323 (2011). Marino argues he suffered sufficient injury to give  
20 him UCL standing when an allegedly illegal foreclosure notice caused him to hire a lawyer and  
21 seek an injunction. Dkt. No. 15 at 5. USBA does not dispute that Marino has plausibly suffered a  
22 sufficient degree of economic injury, but argues instead that USBA did not plausibly cause the  
23 injury with illegal acts. Dkt. No. 16 at 4. The court finds Marino plausibly alleges USBA caused  
24 economic injury to him with illegal business practices. Marino therefore has standing for his UCL  
25 claim.

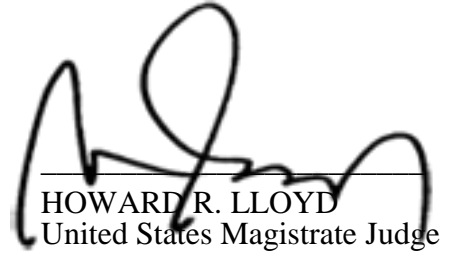
### 26 Conclusion

27 The request for judicial notice is granted. The court dismisses the first claim for relief with  
28

1 leave to amend and denies the motion as to the second claim for relief.

2 **IT IS SO ORDERED.**

3 Dated: 10/8/15

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HOWARD R. LLOYD  
United States Magistrate Judge